83-285

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ALEXANDER L. STEVAS,
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NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

UNITED STATES OF AMERICA,
Respondent

VS.

STEPHEN KELLY,
Petitioner

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether an appellate court which never saw or heard the witnesses may substitute its own findings of fact for those of the trial judge who did when a defendant in a drug case prevails on a suppression motion; and, specifically, whether such appellate court may ignore the command of F.R.Civ.P. 52(a) and reverse an order suppressing certain tape recordings and their transcripts on the basis that the trial court's conclusions were erroneous when there was ample evidentiary support for his finding that the "cooperating individual" did not voluntarily consent to hold the recorded conversations as required by 18 U.S.C. 2511 (2)(c).

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18 U.S.C. 2511 (2)(c)
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OPINIONS OF THE COURTS BELOW

On August 25, 1982, the Honorable Edward N. Cahn of the United States District Court for the Eastern District of Pennsylvania ordered that certain tape recordings and transcripts be suppressed in the matters of *U.S. vs. Stephen Kelly* and *U.S. vs. Michael Kelly*. Judge Cahn's memorandum opinion was filed on February 4, 1982, and is as yet unreported. Following the submission of briefs and oral argument by all parties, the United States Court of Appeals for the Third Circuit, with one judge dissenting, reversed the trial judge in an opinion and order filed May 31, 1983. This opinion is reported at 708 F.2d 121 (3rd Cir. 1983).

Copies of the opinions of the courts below are included in the appendix to this Petition.

STATEMENT OF JURISDICTION

Criminal proceedings were commenced against petitioner Stephen Kelly* by the filing of an indictment in the United States District Court for the Eastern District of Pennsylvania, charging him with violations of Title 18 United States Code, Section 924(c)(1) and Title 21 United States Code, Sections 843(b) and 846. The Government appealed to the United States Court of Appeals for the Third Circuit, pursuant to Title 18 United States Code Section 3731, from the District Court's order suppressing certain tape recordings and their transcripts. In an Opinion and

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*_United States of America vs. Stephen Kelly_, E.D. Pa. Crim. No. 82-43-01. Petitioner's brother was also indicted: _United States of America vs. Michael Kelly_, E.D. Pa. Crim. No. 82-43-02. All proceedings against them were consolidated in the courts below.

Order dated May 31, 1983, the Court of Appeals granted the Government's request and overturned the Suppression Order. Stephen Kelly's Petition for Rehearing and Suggestion for Rehearing In Banc was denied on June 24, 1983.

This Petition for Writ of Certiorari is brought now in the Supreme Court of the United States pursuant to Title 28 United States Code, Section 1254(1).

STATUTE & RULE INVOLVED IN THIS CASE

Title III of the Omnibus Crime Control and Safe Streets Act of 1968: 18 U.S.C. 2511(2)(c) and 18 U.S.C. 2515.

Federal Rule of Civil Procedure 52(a).

The substance of the above is set out more fully in the appendix to this Petition.

STATEMENT OF THE CASE

On February 8, 1982, petitioner Stephen Kelly was indicted in the Eastern District of Pennsylvania for Conspiracy to Possess, Manufacture and Deliver a Controlled Substance, Use of a Firearm to Commit a Felony, and Use of a Communication Facility to Facilitate the Commission of a Felony, in violation of 21 USC 846, 18 USC 924(C)(1) and 21 USC 843(b), respectively. His brother Michael was charged in the same indictment with similar offenses.

During the course of pre-trial discovery, the Government revealed its intention to introduce tape recordings and transcripts of three conversations which purportedly took place between one Edward Bencsik and Stephen or Michael Kelly on January 2 and 4, 1982.

Accordingly, petitioner Stephen Kelly's counsel filed a Motion for

Pre-Trial *Starks* and Suppression Hearing, challenging *inter alia* the voluntariness of Edward Bencsik's participation in tape recording these telephone conversations.

On July 6, 1982, the matter proceeded to an evidentiary hearing before the Honorable Edward N. Cahn. Agent Richard Compton of the Drug Enforcement Administration testified about his role in recording the three conversations. Bencsik himself took the stand; on direct examination he stated he knew the calls were being tape-recorded and had agreed to it. (Appendix at 89A). Cross-examination revealed that Bensalem Township (Pennsylvania) Police Chief Richard Viola, who was present during the telephone calls, talked to Mr. Bencsik about a local criminal matter he was then facing. Cross-examination also revealed that Bencsik's friend Charles "Chad" Clarkson who was present as well during

the three calls, suggested to Chief Viola and Agent Compton that Bencsik be paid $1,000.00 for his cooperation. As a result of the July 6 hearing, although Judge Cahn was *concerned* that Edward Bencsik might have been manipulated by law enforcement officials (App. at 125A), he was prepared to rule that the inducement was not "illegal, improper and therefore grounds for suppressing the tapes". (App. at 130A).

On August 23, 1982, a second pretrial evidentiary hearing occurred at which Agent Compton and Ted Bencsik again testified about the circumstances surrounding the telephone calls. Bencsik affirmed that before he placed the first call, Police Chief Viola told him he could be arrested for missing a court date in his local criminal case. (App. at 169A). He also admitted to being a regular drug user during early January

1982, particularly of methamphetamine, Demerol and marijuana, some or all of which he may have used on January 2, 3, and 4. (App. 174A-178A). He explained again that Clarkson brought up the subject of money or reimbursement with Chief Viola and Agent Compton, and that this occurred in his presence during the time period when the phone calls were made. (App. 202A). Significantly, Ted Bencsik also admitted that three days before the second evidentiary hearing he had spent several hours with DEA Agent Compton and the Assistant United States Attorney for the purpose of "rehashing the whole thing", and that both the agent and counsel made "corrections in his memory". (App. at 208A-212A, 214A, 215A). At the close of the August 23 hearing, Judge Cahn ruled that the tape recorded conversations were consensual on Bencsik's part, while reserving the right to

reconsider his ruling. (App. at 243A).

Over the next two days, August 24 and 25, 1982, Judge Cahn entertained oral argument and memoranda of law from all counsel because, on the basis of all the testimony before him and his reading of the Third Circuit decisions treating this issue, the Judge was concerned that Edward Bencsik had *not* voluntarily consented to record his conversations with the Kellys. (App. at 280A-281A). The judge believed that the totality of circumstances - Bencsik's probable use of drugs, a subsequent payment of money, and Ted Bencsik's "highly suggestible" nature "subject to manipulation" - had made it impossible for the man to render a valid consent to the tape recordings. And, thus for the first time in his seven years on the bench, Judge Cahn ordered the Suppression of tape recordings and transcripts procured by the Government

with the aid of a "cooperating individual". (App. at 247A-248A, 251A).

The Government thereupon filed an interlocutory appeal in the United States Court of Appeals for the Third Circuit, which was briefed by all counsel and argued before a three-judge panel of that court. In an opinion filed May 31, 1983, the Court of Appeals concluded that the conclusions of Judge Cahn were "erroneous", and accordingly reversed his order suppressing the tape recordings and transcripts. Circuit Judge Gibbons dissented with an opinion.

Your petitioner Stephen Kelly filed a Petition for Rehearing and Suggestion for Rehearing in Banc, as did his brother Michael Kelly. Both such petitions were denied on June 24, 1983. Both Stephen and Michael Kelly are now asking this Honorable Court to review the matter on certiorari.

REASON FOR ALLOWANCE OF THE WRIT

The Honorable Edward N. Cahn of the United States District Court for the Eastern District of Pennsylvania found that the Government's "cooperating individual" had not in fact voluntarily consented to placing and recording certain telephone conversations to your petitioner Stephen Kelly and his brother Michael. Accordingly prior to commencing the Kellys' trial, Judge Cahn ordered the suppression of all such tape recordings and their transcripts pursuant to *U.S. vs. Starks*, 515 F.2d 112 (3d Cir. 1975) and 18 U.S.C. 2515. Considering the Government's appeal of this order, the United States Court of Appeals for the Third Circuit ruled that 1) whether consent to record a conversation was voluntary is a question of fact to be determined from the totality of the circumstances, and 2) the conclusions of the trial judge were

"erroneous" and thus reversible, citing Federal Rule of Civil Procedure 52(a). However, that Rule permits District Court findings of fact to be reversed only if they were *clearly* erroneous. Furthermore, the Court of Appeals here engaged in impermissable *de novo* fact-finding. We submit that it would be entirely appropriate for this Honorable Court to reinstate the District Court's suppression order and in so doing ensure that the distinct functions of fact finding by the District Court and appellate review in the Circuit Court are kept intact. *Pullman-Standard vs. Swint,* _____ U.S. _____, 102 S. Ct. 1781 (1982).

In the opinion of the majority of the three-judge panel in this case, "the trial court was correct in looking at the totality of circumstances to determine the issue of voluntariness". (C.A. Slip Opinion at 9). The court also

"acknowledge(d) the district court's primary role in making the determination of voluntariness, and ... the careful approach to the problem by the trial judge below". (C.A. Slip Opinion at 12). Nevertheless, the majority went on to fault each of District Judge Cahn's findings of fact and ultimately to reverse his conclusion that the consent in this case had not been voluntary.

A person's consent to recording a telephone conversation is a question of fact to be determined from the totality of the circumstances. *Schneckloth vs. Bustamonte,* 412 U.S. 218, 227 (1973); *U.S. vs. Brandon,* 633 F.2d 773 (9th Cir. 1980); *U.S. vs. Sanford,* 673 F.2d 1070 (9th Cir. 1982). Therefore, on appeal such "findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the

Pages misnumbered in original copy.

credibility of the witnesses". F.R. Civ. P. 52(a). See also, *Brandon*, supra, *Sanford*, supra. With this statement of the law the Third Circuit purported to agree, yet its opinion in this case flies in the face of the controlling rule and court decisions.

The totality of circumstances which the appellate court here agreed was appropriate for the district court to evaluate included: drug usage by the cooperating individual Edward "Ted" Bencsik; pressure put upon Bencsik by a friend Charles (Chad) Clarkson; assurances of help from Bensalem Township (Pa.) Police Chief Richard Viola and DEA Agent Compton; and Ted Bencsik's highly suggestible nature.

Judge Cahn found as a fact that Mr. Bencsik had probably been using drugs when he made the three telephone calls on January 2 and 4, 1982 (D.C. Slip

Opinion at 8). Bencsik admitted to being a regular, daily drug user during early January 1982 (App. at 174-175A): of methamphetamine which makes him "speed", Demerol which makes him sleepy, and marijuana which keeps him "calm, cool, and collected". (App. at 177-178A). Judge Cahn specifically concluded that he would not believe Bencsik when he said drugs didn't impair his ability to reason (App. at 281 A). In reversing the trial court, the Court of Appeals chose to characterize it as "possible" drug use which *did not* impair Bencsik's judgment (C.A. Slip Opinion at 10). Such manipulation of a trial court's conclusions is impermissable for the kind of appellate review called for in this case. F.R. Civ. P. 52(a); *Pullman-Standard vs. Swint*, supra.

Judge Cahn also found as a fact that Ted Bencsik was under pressure to

cooperate with the authorities from his friend Charles Clarkson who had initiated Bencsik's contact with the police. (D. C. Slip Opinion at 5). The Third Circuit downplayed this factor by concluding that although Clarkson may have put him "on the spot" Bencsik knew he "really didn't have to go along with it" (C.A. Slip Opinion at 11). This ignores crucial testimony in the hearings before Judge Cahn:

> (BENCSIK)... I had been put in that position beyond my control and then when I was in that position I didn't have much of a choice. (App. 227A).

Judge Cahn held that where an informant's consent to place or record telephone calls was given because that informant felt s/he *had* to do so, the consent is not voluntary, *U.S. vs. Laughlin,* 222 F.

Supp. 264 (D.D.C. 1963), cited with favor in *U.S. vs. Osser,* 483 F.2d 727 (3d Cir. 1973). For the majority of the Third Circuit to recognize only part of the record testimony and then to use that as a basis for overruling the trial court is impermissable under the scope of appellate review called for in this case. F.R. Civ. P. 52(a); *Pullman-Standard vs. Swint,* supra.

Judge Cahn found as a fact that just prior to making the first telephone call (the only call to Stephen Kelly) Ted Bencsik received the impression from Bensalem Police Chief Viola that he might intercede to help in Bencsik's local criminal case, but that as Chief of Police he could also have Bencsik arrested for missing a court appearance (D.C. Slip Opinion at 6). The Third Circuit has noted Mr. Bencsik testified that Viola's assurances of help were not determinative

of his decision to make the calls. (C.A. Slip Opinion at 10-11). And so he *said* (App. at 99A, 105A). But Bencsik also testified that he felt *manipulated* by Chief Viola (App. at 110-111A). For the Third Circuit to have taken note of only certain testimony relied on by the trial court and then to overrule that court's factual conclusions is impermissable under the scope of appellate review called for in this case. F.R.Civ. P. 52 (a); *Pullman-Standard vs. Swint,* supra.

Judge Cahn found as a particularly important factor, especially in combination with all of the others, the highly suggestible nature of Edward Benscik (D.C. Slip Opinion at 8), who appeared to the judge a much different witness at the August 23 hearing than at the earlier hearing on July 6, 1982, and who was easily led toward a position that could not have been accurate (D.C. Slip Opinion

at 8-9).

The majority opinion on appeal dismisses the impact Bencsik's mind set would have had on his ability to consent in early January 1982 by noting that he "was *somewhat confused* at times at the August 23 hearing", and finding no evidence in the record to indicate Bencsik was incapable of making a free decision to place and record his phone calls on January 2 and 4. To the contrary, as Judge Cahn pointed out, Ted Bencsik himself waivered on the voluntariness of his consent during the suppression hearings (App. at 280 A, 289A). Judge Cahn found that Mr. Bencsik was merely saying "the right words" each time the Assistant United States Attorney asked him whether he knew his calls were being recorded and had agreed to it (App. at 285A). The record demonstrates how very poor was the young man's memory for dates, times,

and places (App. at 190A, 192-193A): and how at one point he answered a question by defense counsel by saying all his testimony to that point was untrue (App. at 238A). As Bencsik admitted, the Assistant U.S. Attorney and DEA Agent Compton met with him for some three hours prior to the August 23 hearing to "refresh his memory" and straighten out the "differences" and "idiosyncracies" in his story (App. at 209A, 215A).

As this Honorable Court ruled in a similar context:

> In examining all the surrounding circumstances to determine if in fact the consent to search was coerced, account must be taken of ... the possibly vulnerable subjective state of the person who consents.

Schneckloth vs. Bustamonte, 412 U.S. at 229. The district court was in a unique position, having observed Ted Bencsik's "performance" during two days of

testimony, to assess the impact all of the other coercive factors would have had on his highly suggestible nature some seven or eight months earlier. There is ample support in the record for his conclusion, and thus the proper standard of review would preclude a reversal by the Third Circuit on this issue. F.R. Civ. P. 52(a); *Pullman-Standard vs. Swint*, supra.

Fully a decade before the *Pullman-Standard* decision, the Third Circuit had established its formulation for the standard of review over district courts' factual conclusions:

> In reviewing the decision of the District Court, our responsibility is not to substitute findings we could have made had we been the fact-finding tribunal; our sole function is to review the record to determine whether the findings of the district court were clearly erroneous, i.e., whether we are 'left with a definite and firm conviction that a mistake

> has been committed'. (Citation omitted). It is the responsibility of the appellate court to accept the ultimate factual determination of the fact-finder unless that determination either (1) is completely devoid of minimum evidentiary support displaying some hue of credibility, or (2) bears no rational relationship to the supporting evidentiary data. Unless the reviewing court establishes the existence of either of these factors, it may not alter the facts found by the trial court. To hold otherwise would be to permit a substitution by the reviewing court of its finding for that of the trial court, and there is no existing authority for this in the federal judicial system, either by American common law tradition or by rule and statute.

Krasnov vs. Dinan, 465 F.2d 1298, 1302-3 (1972). This is still the law of the land, as this Court made clear in its *Pullman-Standard* opinion.

While the Third Circuit may have felt it would have reached a different result had it been presented with the same set of facts and testimony, such is

an inadequate basis for setting aside District Judge Cahn's conclusions. F.R. Civ. P. 52(a). Petitioner is particularly disturbed that the majority of the panel in this case comprised two-thirds of the panel which reached the decision in *Krasnov vs. Dinan,* supra, and now ignores its standard of review.

With all due respect to the majority of the Third Circuit, we submit that an appellate court, which never saw or heard the witnesses, cannot substitute its own findings of fact for the trial judge who did in order to overturn what was probably seen as an unfortunate order suppressing critical evidence in a drug case. Petitioner prays this Honorable Court will grant this Petition and thereafter reverse the order of the Court below, thus restoring the orderly and proper division of labor between a trial court's duty to make findings of fact

and appellate review thereof. *Pullman-Standard vs. Swint*, supra; *Krasnov vs. Dinan*, supra. F. R. Civ. P. 52(a).

Respectfully submitted,

BARRY H. DENKER, ESQUIRE

BY: MARY MC NEILL ZELL, ESQUIRE

* * * * * * * * *

A P P E N D I X

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 82-1539 and 82-1541

UNITED STATES OF AMERICA
Appellant

v.

KELLY, MICHAEL
Appellee in No. 82-1539

and

UNITED STATES OF AMERICA
Appellant

v.

KELLY, STEPHEN
Appellee in No. 82-1541

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

D.C. Criminal Nos. 82-00043-02 and 82-00043-01

Argued February 18, 1983

Before: GIBBONS, HUNTER, and ROSENN, *Circuit Judges*

Filed May 31, 1983

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OPINION OF THE COURT

HUNTER, *Circuit Judge*:

1. The United States appeals from two pre-trial orders entered by the United States District Court for the Eastern District of Pennsylvania suppressing evidence in the federal criminal prosecutions of Stephen Kelly and Michael Kelly. The government had planned to introduce three tape-recorded phone conversations between the Kellys and Edward Bencsik involving an alleged deal to buy phenyl-2-propanone. The district court suppressed the tape recordings and their transcripts because it found that Bencsik had not voluntarily consented to the monitoring of the phone conversations. We will reverse.

I

Facts

2. In January of 1982, Edward Bencsik was living in Bensalem Township, Pennsylvania at the apartment of a friend, Charles Clarkson. The government contends that on the evening of January 1, 1982, Stephen and Michael Kelly went to Bencsik's apartment and forced Bencsik at gunpoint to turn over the car keys to a 1969 Plymouth GTX which was parked in his driveway.[1] The Kellys allegedly took the car as security for $2000 that Michael Kelly had advanced Bencsik in a drug deal. The next evening Bencsik told Clarkson that the car had been taken by the Kellys as collateral for the $2000. Clarkson, concerned over the disappearance of the car, insisted on telephoning the police to report that it had been stolen. A Bensalem Township police officer arrived at Clarkson's apartment and, while Bencsik waited outside, Clarkson presented to the investigating officer an outline of Bencsik's dealings with the Kellys in hypothetical terms. After the officer left, Clarkson brought Bencsik back into the apartment and suggested to him that he should cooperate with the police.

3. A short time later the officer returned, accompanied by Bensalem Township Police Chief Richard Viola. Viola discussed with Bencsik his actual dealings with the Kellys and asked him if he would be willing to phone the Kellys to verify what had happened. Bencsik agreed. During that discussion Clarkson brought up that Bencsik had a pending criminal charge in Bucks County, Pennsylvania, and asked Viola if he could assist Bencsik in resolving it. Viola was non-committal but said that he would look into the matter.

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1. The Plymouth GTX had been sold to Bencsik by Clarkson's girlfriend. At the time the Kellys allegedly seized the car, Bencsik owed Clarkson's girlfriend a substantial balance on the car, and title was still in her name.

4. That same evening Viola contacted DEA Special Agent Richard Compton who Viola knew was involved in an active investigation of Stephen Kelly. Viola and Compton agreed to meet with Bencsik at Viola's apartment to record Bencsik's phone call. When Compton arrived he spoke with Bencsik about the investigation and told him that he wanted to record a conversation between Bencsik and either Stephen or Michael Kelly. Compton suggested certain topics that Bencsik could mention in the phone call but did not specify what Bencsik should say. He also explained that he needed Bencsik's consent to tape-record the call. Bencsik agreed to the recording and the monitoring of the call. Compton dialed the Kellys' number, and Bencsik spoke with Stephen Kelly for several minutes. Compton listened to and recorded that conversation.

5. On the morning of January 4, 1982, Bencsik went to the Bensalem Township Police Department and was fitted with a body recorder. Shortly after noon he returned to Clarkson's apartment where he met with Clarkson, Compton, and Viola. Compton asked Bencsik if he could monitor another call between Bencsik and the Kellys. Bencsik agreed. Bencsik called the Kellys, and Compton recorded a conversation between Bencsik and Michael Kelly. Later that afternoon Compton asked Bencsik to make another call. Bencsik again agreed, and Compton recorded a second conversation between Bencsik and Michael Kelly. Both Kellys were arrested later that day.[2]

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2. Sometime prior to the two January 4 phone calls, Viola allegedly told Bencsik that Bencsik was late for a court date in his Bucks County criminal matter and therefore was subject to arrest. Bencsik stated, however, that he knew that he was not late for any hearings and that he neither believed nor was influenced by Viola's claim. App. at 112A-13A. Although Viola attempted to intercede in Bencsik's behalf, on January 6, 1982, Bencsik entered a plea of guilty in that case and was placed on probation.

6. Bencsik testified that between January 2 and January 4 he probably used either marijuana or methamphetamine. Although he could not remember exactly what drugs he might have taken, Bencsik described himself as a fairly regular user of methamphetamine, Demerols, and marijuana during that time period. Bencsik stated, however, that the drugs did not impair his ability to reason and think and that his usage was "[n]ot to an extent [that] I wasn't in touch with reality." App. at 176A-77A.

7. On the evening of January 6, Bencsik again met with Clarkson, Compton, and Viola. The subject of Bencsik's possible relocation to ensure his personal safety came up as well as Clarkson's concern over being paid for the car. The following day Compton gave Bencsik $1000 in cash from DEA funds. Bencsik paid Clarkson $700 to cover the balance owed on the car and kept the remainder for relocation expenses. At no time prior to the making of the tape-recorded conversations did either Compton or Viola express or imply to Bencsik that he would be paid any money for giving his consent to the recordings.

Proceedings Below

8. On February 8, 1982, a federal grand jury indicted Stephen and Michael Kelly for their alleged involvment in an unlawful plan to manufacture and sell drugs. Stephen Kelly was charged with conspiracy to manufacture, distribute, and possess with intent to distribute controlled substances in violation of 21 U.S.C. §846 (1976), with using a firearm to commit a felony in violation of 18 U.S.C. §924(c)(1) (1976), and with knowingly and intentionally using a telephone in facilitating the commission of a felony in violation of 21 U.S.C. §843(b) (1976). Michael Kelly was charged with conspiracy to manufacture, distribute, and possess with intent to distribute controlled substances in violation of

21 U.S.C. §846 (1976), and with two counts of knowingly and intentionally using a telephone in facilitating the commission of a felony in violation of 21 U.S.C. §843(b) (1976).

9. Prior to trial the defendants moved for a hearing to determine the admissibility of the three recorded phone conversations. *See United States v. Starks*, 515 F.2d 112 (3d Cir. 1975). On July 6, 1982, the district court held an evidentiary hearing on defendants' motion. After listening to testimony from Compton and Bencsik, the district court tentatively ruled that the tapes were admissible. It based its ruling upon a determination that the tapes were audible, that a proper chain of custody had been established, and that Bencsik had consented to the recording of the conversations by Compton. Because Michael Kelly's appointed counsel had not received notice of the July 6 hearing, the court held another hearing was held on August 23, 1982. At the end of that hearing, the trial judge again ruled that the tapes were admissible. The following morning, however, the judge reversed his ruling and held the tapes inadmissible. After hearing further oral argument on August 25, the trial judge issued his final orders excluding the tapes and their transcripts.

10. In his written opinion the trial judge stated that "[t]he critical factor in my decision to suppress the tapes was my determination that Edward Bencsik had not consented voluntarily to police monitoring of his conversations with the Kellys." *United States v. Stephen J. Kelly and Michael Kelly*, Crim. No. 82-00043, slip op. at 2 (E.D. Pa. Feb. 4, 1983). Citing *United States v. Santillo*, 507 F.2d 629 (3d Cir.), *cert. denied*, 421 U.S. 968 (1975), and section 802 of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No.

90-351, §802, 82 Stat. 197, 212-23,[3] the trial judge ruled that, if Bencsik did not voluntarily consent to the recordings of the phone conversations then those recordings were an unreasonable invasion of the Kellys' privacy and had to be suppressed. *Kelly*, slip op. at 2-3. Reviewing the testimony the trial judge found that although Compton and Viola had not "applied directly any coercion, physical or psychological, to Bencsik to obtain his cooperation," *id.* at 6, his consent "was impermissibly clouded" by several factors: his possible drug use, his apprehension of physical harm at the hands of the Kellys, the pressure from Clarkson, the assurances of help from Viola and Compton, and Bencsik's own "highly suggestible nature." *Id.* at 8. Viewing all of the surrounding circumstances, the trial judge found that Benscik's consent was not voluntary, and thus he suppressed the tapes.

II

11. As properly recognized by the trial court below, it does not violate an individual's constitutional or statutory privacy interests to introduce at a criminal trial tape

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3. In enacting Title III Congress created a comprehensive scheme for the regulation of wiretapping and electronic surveillance. *Gelbard v. United States*, 408 U.S. 41, 46 (1972). The statute contains a strict exclusionary rule which prohibits the use of the contents of any communication "in any trial, hearing, or other proceeding in or before any court . . . if the disclosure of that information would be in violation of this chapter." 18 U.S.C. §2515 (1976). The Act provides, however, for several situations where disclosure is allowed. That part of the statute relevant to the instant appeal states:

> (2)(c) It shall not be unlawful under this chapter for a person acting under the color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

18 U.S.C. §2511(2)(c) (1976). *See generally United States v. Cianfrani*, 573 F.2d 835, 854-59 (3d Cir. 1978).

recordings of his private conversations if the other party to those conversations voluntarily consented to their recording. *United States v. Caceres*, 440 U.S. 741, 744 (1979); *United States v. White*, 401 U.S. 745, 750-51 (1971) (plurality opinion); *United States v. Moskow*, 588 F.2d 882, 891 (3d Cir. 1978); *United States v. Santillo*, 507 F.2d 619, 631-34 (3d Cir.), *cert. denied*, 421 U.S. 968 (1975); *United States v. Osser*, 483 F.2d 727, 730 (3d Cir.), *cert. denied*, 414 U.S. 1028 (1973); 18 U.S.C. §2511(2)(c) (1976); *see* S. Rep. No. 1097, 90th Cong., 2d Sess. 66, 93-94, *reprinted in* 1968 U.S. Code Cong. & Ad. News 2112, 2153, 2182.[4] "The principle underlying [that rule] is that when one reveals information to an individual, one takes the risk that one's confidence in that individual is misplaced." *Flaherty v. Arkansas*, 415 U.S. 995, 999 (1974) (Douglas, J., dissenting from the denial of certiorari). Neither the Constitution nor an Act of Congress affords protection "to a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." *Hoffa v. United States*, 385 U.S. 293, 302 (1966). Thus no justifiable expectation of privacy is violated if the government subsequently uses that conversation at trial.

12. Determining whether a person's consent to the recording of a phone conversation is "voluntary" is not a simple task. *See Culombe v. Connecticut*, 367 U.S. 568, 604-05 (1961) (opinion of Frankfurter, J.). It is a question of fact, which the court must determine from the totality of the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973); *United States v. Sanford*, 673 F.2d 1070, 1072 (9th Cir. 1982); *United States v.*

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4. In its opinion the district court addressed the consent issue in terms of privacy interests. For the purposes of this case, the district court's ruling that the Kellys' privacy interests were not violated because Bencsik voluntarily consented to the tape recordings is sufficient to establish the voluntariness requirement listed in footnote 11 of our opinion in *United States v. Starks*. *See Starks*, 515 F.2d at 121 n.11.

Brandon, 633 F.2d 773, 776 (9th Cir. 1980).[5] Consent to a wiretap is not voluntary where it is coerced, either by explicit or implicit means or by implied threat or covert force. *Schneckloth*, 412 U.S. at 228; *Osser*, 483 F.2d at 730. An individual's decision to allow the police to record a phone conversation, however, is not necessarily involuntary just because that individual's motives were self-seeking, or because he harbored expectations of personal benefit. *Moskow*, 588 F.2d at 891; *Osser*, 483 F.2d at 730. Rather consent will be considered voluntary if, from the totality of the circumstances, the trial court determines that the party agreeing to a wiretap did so consciously, freely, and independently and not as the result of a coercive overbearing of his will.

13. Turning to the instant case, the trial court was correct in looking at the totality of the circumstances to determine the issue of voluntariness. After a thorough and extensive review of the record, however, we must hold that the trial court erred when it determined that Bencsik did not voluntarily consent to the recording of his telephone conversations with the Kellys. The record reveals, as the trial court itself found, that Compton and Viola did not directly apply any coercion, physical or psy-

5. We reject the government's argument that the Second Circuit's decision in *United States v. Bonanno*, 487 F.2d 654 (2d Cir. 1973), requires us to apply a different test for determining whether an informer consented to the monitoring or recording of a telephone call. The government contends that *Bonanno* holds that a district court, when determining voluntariness, should only examine whether an informer went ahead with a phone call knowing that it was being recorded by the police. We disagree. We read Judge Friendly's decision as merely recognizing that the factual issue of consent is slightly different in cases where the defendant's consent to a physical search is at issue. In those cases the trial court has to determine whether the *defendant* voluntarily consented to a search contrary to his own interests, rather than whether an *informer* voluntarily consented to a decision "which he has ordinarily decided sometime previously and [which] entails no unpleasant consequences." *Id.* at 658.

chological, to Bencsik to obtain his cooperation in the monitoring of the telephone calls. *Kelly*, slip op. at 6; app. at 279A, 230A-31A, 238A, 248A. Bencsik testified that he consented to the recordings, app. at 89A, 99A, 105A, 227A-31A, and that he knew he did not "have to go along" with the police at the time he decided to cooperate, app. at 227A.[6] As the trial court stated, "there is no question" that he agreed to the tape recordings of his conversations with the Kellys. App. at 279A.

14. Despite the lack of official coercion, the trial judge refused to find that Benscik voluntarily agreed to the recordings. While we agree with the trial judge that his examination of the circumstances is not limited solely to instances of governmental misconduct, *see* app. at 282A, 287A, we can not agree that the other factors identified by the judge lead to a finding in this case that Bencsik did not voluntarily consent to the tape recordings. First, the trial court pointed to Bencsik's possible drug use at the time the phone calls were recorded. The only evidence on the record about Bencsik's drug use was his own testimony. He stated that he could not specifically remember what drugs, if any, he had taken on January 2 or on January 4. He stated, however, that any drugs he might have taken did not impair his "ability to reason and [to] think things through." App. at 176A. Neither Compton nor Viola was aware that Bencsik was using any drugs at the time the phone calls were made. App. at 66A, 201A. As the trial court itself recognized, "[t]here is no evidence that those drugs impaired his judgment." App. at 237A. Second, the trial court cited the assurances of help from Viola and Compton in support of its finding that Bencsik's consent was not voluntary. Bencsik testified, however, that Viola's non-committal assurances of help in the Bucks County matter

6. On the same day that he made the second and third phone calls, Bencsik voluntarily went to the police station to be fitted with a body recorder. App. at 171A-72A.

were not determinative in his decision to make the phone calls. App. at 99A, 105A. Bencsik was actually unaware that Viola ever interceded in his behalf. App. at 109A. Compton did eventually pay Bencsik $1000 out of DEA funds but it was Clarkson, not Bencsik, who initiated discussion about those funds, app. at 179A, 190A-91A, 202A, and that discussion did not occur until *after* Bencsik had made all three phone calls, app. at 108A, 168A, 185A; 189A-90A. Third, the trial court voiced concern about the pressure put on Bencsik by Clarkson. *See* app. at 165A, 223A-24A. Bencsik did testify that Clarkson had put him on the "spot," app. at 227A, yet stated that he still made the phone calls voluntarily and that he "realized [that he] really didn't have to go along with it" if he did not want to cooperate, app. at 227A, 230A.[7] Finally, the trial judge stated that based on his appearance at the August 23 hearing, he felt that Bencsik had a "highly suggestible nature." *Kelly*, slip op. at 8; app. at 247A, 280A, 282A-83A. While his testimony does reveal that Bencsik was somewhat confused at times at the August 23 hearing, there is no evidence in the record to indicate that Bencsik was incapable of making an independent free decision at the time the recordings were made.

15. We hold that the instant record clearly establishes that Bencsik voluntarily consented to having his phone conversations with the Kellys recorded. Bencsik repeatedly and consistently testified that he voluntarily agreed to the monitoring of the calls by Compton. The record does not show that his drug usage prevented him in any way from consciously and independently reach-

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7. The district judge also noted in his opinion that Bencsik's "apprehension of death or physical harm at the hands of the Kellys," *Kelly*, slip op. at 8, was a factor which "clouded" Bencsik's consent to the wiretap. We disagree. The Kellys will not be heard to complain that their threats tainted Bencsik's consent to assist the police. *See* app. at 283A-84A.

ing his decision. *See United States v. Marcello*, 508 F.Supp. 586, 599-601 (E.D. La. 1981); *United States v. Cafaro*, 480 F. Supp. 511, 521-22 (S.D.N.Y. 1979). Bencsik's decision to cooperate, although perhaps self-serving, was not based on inducements which rose to the level of an overbearing of his will. *See United States v. Horton*, 601 F.2d 319, 322 (7th Cir.), *cert. denied*, 444 U.S. 937 (1979); *Moskow*, 588 F.2d at 891; United *States v. Juarez*, 573 F.2d 267, 278 (5th Cir.), *cert. denied*, 439 U.S. 915 (1978); *Osser*, 483 F.2d at 730. Finally, even if Bencsik was put on the spot by Clarkson, the evidence does not establish that he was unable to make an independent judgment about whether to assist the police at the time the phone calls were recorded. We acknowledge the district court's primary role in making the determination of voluntariness, and we recognize the careful approach to the problem by the trial judge below. On this record, however, we must hold that his conclusions were erroneous. Fed R. Civ. P. 52(a).

III

16. We will reverse the district court's orders of August 25, 1982, suppressing the tape recordings and their transcripts, and we will remand this cause to the district court for further proceedings consistent with this opinion.

GIBBONS, *Circuit Judge*, dissenting.

The government appeals from an order suppressing a recording of a telephone conversation. It is undisputed that Section 802 of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, §802, 82 Stat. 197, 212-23, 18 U.S.C. §2515, mandates suppression unless "one of the parties to the communication has given prior consent to such interception." 18 U.S.C. §2511(2)(c)(1976). The majority holds that the voluntariness of such consent controls as a matter of law the suppression of the recording, and that voluntariness is a question of fact which the court must determine from the totality of the circumstances. I completely agree with the majority that "consent will be considered voluntary if, from the totality of the circumstances, the trial court determines that the party agreeing to a wiretap did so consciously and independently and not as a result of a coercive overbearing of his will." Typescript at 11. Thus I join in the majority's tacit rejection of the government's contention that for purposes of the wiretap statute consent should be equated with mere knowledge of what the law enforcement officers want.[1] The test is voluntariness in the classic sense of uncoerced free choice, determined from the totality of the circumstances, and, at least with respect to statutory issues such as that before us, the inquiry is factual. Moreover I agree with the majority that since voluntariness of the consent is a factual matter the scope of review is the clearly erroneous standard of Fed. R. Civ. P. 52(a).

At that point we part company. While the evidence certainly did not compel the conclusion that Edward Bencsik's consent to interception of telephone conversations to which he was a party was coerced, I am unable to hold that the carefully considered conclusion of the

1. This contention is predicated on a perhaps overbroad reading of United States v. Bonanno, 487 F.2d 654, 658-59 (2d Cir. 1973).

trial court to that effect "(1) is completely devoid of minimum evidentiary support displaying some hue of credibility, or (2) bears no rational relationship to the supportive evidentiary data." *Krasnov v. Dinan*, 465 F.2d 1298, 1302 (3d Cir. 1972). Certainly the majority has not established the existence of either of those factors. The *Krasnov v. Dinan* standard for determining when a trial court's finding of fact is clearly erroneous should be applied rigorously in all cases, but especially in cases where, as here, the factual determination depends so much upon the factfinder's face to face evaluation of the witnesses. Rule 52(a) explicitly cautions that "due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Judge Cahn relied, in making his finding of coercion, on two factors. First, his assessment of Bencsik was that he has a suggestible character. We did not see or hear Bencsik, and we are in no position to second-guess Judge Cahn with respect to that character trait. Second, he concluded that Benscik was on drugs during the period in which he gave his consent. The government urges that drug-taking does not necessarily affect capacity to consent. While this is true, it does not follow that drug taking *never* affects capacity to consent. Methampetamine could have heightened Bencsik's feelings of peril, and caused him to perceive that he had no choice but to cooperate. Marijuana could have increased his suggestibility. There is evidence that both were used. The record also contains several instances of faulty memory. Finally there is evidence from which a factfinder could conclude that Police Chief Viola and Charles Clarkson exerted pressure on Bencsik to record this telephone conversation with Mr. Kelly.

After considering carefully over a period of more than twenty-four hours the impression that Bencsik made, and his testimony about the totality of circumstances in which he consented to record his telephone conversations, the court found as a fact that his consent

was coerced. There is evidentiary support which bears a rational relationship to that finding. This court, which never saw or heard the witnesses, cannot substitute its own finding of fact for that of the trial judge who did. *Pullman-Standard v. Swint*, ____ U.S. ____, 102 S.Ct. 1781 (1982). Thus I would affirm the order appealed from. Suppression is required by 18 U.S.C. §2515 (1976).

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	CRIMINAL NO. 82-00043
	:	
STEPHEN J. KELLY and MICHAEL KELLY	:	

MEMORANDUM OPINION

CAHN, J. February 4, 1983

On August 25, 1982, I granted the motion of the defendants, Stephen Kelly and Michael Kelly, to suppress as evidence the tape recordings of three telephone conversations. The Government seeks to use these recordings as part of its case against the defendants, each of whom has been charged with three counts relating to an alleged conspiracy to sell phenyl-2-propanone (P2P) and methamphetamine.[1] One of these recorded conversations took place on January 2, 1982, between Edward Bencsik and Stephen Kelly. The other two

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[1]Count One of the indictment charges both Stephen J. and Michael Kelly with conspiracy to possess with intent to distribute P2P and to manufacture and distribute methamphetamine. Counts Two and Three charge Stephen Kelly with using a firearm and a telephone in furtherance of the conspiracy. Counts Four and Five charge Michael Kelly with two instances of using a telephone in furtherance of the conspiracy.

conversations took place on January 4, 1982, between Edward Bencsik and Michael Kelly. The Government requested that the case not proceed so that it could appeal my order pursuant to 18 U.S.C. §3731, and I granted this request.

The critical factor in my decision to suppress the tapes was my determination that Edward Bencsik had not consented voluntarily to police monitoring of his conversations with the Kellys. The voluntariness of Bencsik's consent is the central issue in the suppression proceedings, and an issue which the defendants have standing to raise, because of the holdings of United States v. White, 401 U.S. 745 (1975) (plurality opinion), and Lopez v. United States, 373 U.S. 427 (1963).

Those cases established that an individual possesses a guarantee of privacy against those government interceptions of messages which are not reasonably expectable by either party. Thus, if one of the two parties to a telephone conversation has fully consented to its recording, as the Government claims Bencsik did on January 2nd and 4th, then neither party may later raise the Fourth Amendment to bar the use of the tapes as trial evidence.[2] United States v.

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[2] 18 U.S.C. §2511(2)(c) also provides that a warrantless police interception of a telephone conversation is not unlawful when one of the parties to the communication has given prior consent to such interception.

Santillo, 507 F.2d 629, 634 (3d Cir.), cert. denied, sub nom. Buchert v. United States, 421 U.S. 968 (1975); United States v. Baynes, 400 F.Supp. 285, 291 (E.D. Pa. 1975). If Bencsik did not voluntarily consent to the Government's recording of his three conversations with Stephen and Michael Kelly, however, then the Kellys are correct that these recordings were an unreasonable invasion of their privacy and therefore should be supressed.

I conducted hearings on the motion to suppress on July 6, 1982, and on August 23, 24, and 25, 1982. The factual circumstances which emerged from these hearings and from the record papers are as follows.

Michael Kelly first met Edward Bencsik in December, 1981. Following a transaction involving the two men in the early part of December, Michael Kelly met with Bencsik again and informed Bencsik that he wished to buy a half-pound of methamphetamine. Bencsik agreed to fill this order. On December 22, 1981, Michael Kelly gave Bencsik $2,000 as a down payment on the methamphetamine. Bencsik later informed the defendants that he would return the money rather than supply them with the desired substance.

By January 1, 1982, Bencsik had not returned the $2,000. On that day Stephen Kelly drove to Bencsik's residence

and, at gunpoint, forced Bencsik to accompany him to his own apartment in Bensalem Township. Stephen Kelly instructed Bencsik that he and his brother wanted Bencsik to supply them with phenyl-2-propanone in order to satisfy his debt. As the Government has represented in its Trial Memorandum, both Stephen and Michael Kelly threatened Bencsik's life at the apartment. The Kellys then drove Bencsik back to his residence in Levittown. At Bencsik's home, Stephen Kelly forced Bencsik at gunpoint to turn over the car keys to a 1969 Plymouth GTX which was parked in Bencsik's driveway. The Plymouth GTX had been sold to Bencsik by the girlfriend of Charles "Chad" Clarkson, a friend of Bencsik. At the time that the Kellys seized the automobile, Bencsik owed Clarkson's girlfriend a substantial balance on the automobile and title was still in her name.

On the following day, January 2nd, Clarkson, who was disturbed over the disappearance of the automobile, contacted the Bensalem Township police. Clarkson apparently presented to the police a "hypothetical" situation involving Bencsik's actual dealings with the Kellys. (Tr. of August 23rd at 94-95). The officer to whom Clarkson gave his report returned within a short time to Clarkson's apartment, where Bencsik also was staying, with Bensalem Police Chief Richard Viola. Viola suggested that Bencsik make monitored telephone calls to the Kellys. (Tr. of August 23rd at 96).

That evening Bencsik made the first recorded telephone call to Stephen Kelly from Chief Viola's apartment. Special Agent Compton of the Drug Enforcement Administration was also present. Two days later, on January 4, 1982, Bencsik made the other two monitored telephone calls from Charles Clarkson's apartment. When those calls were made, Bencsik was in the company of Chief Viola, Compton, Clarkson, and Clarkson's girlfriend.

At various points during the suppression hearings which I conducted on July 6, 1982, and August 23, 1982, Bencsik testified in response to direct questioning that he had voluntarily agreed to make the recorded telephone calls to the Kellys. However, other elements of his testimony created serious doubts in my mind as to whether his consent was truly voluntary. When I asked Bencsik why he had agreed to allow the police to monitor his conversations with the Kellys, he replied, "...I felt as though I was more or less put on the spot...I had been put in that position beyond my own control...I didn't have much of a choice." (Tr. of August 23rd at 96). Bencsik was under pressure to cooperate in the recordings from Clarkson, who had initiated Bencsik's contact with the police. (Tr. of August 23rd at 48).

Chief Viola was aware prior to the first recording of a criminal case pending against Bencsik in the Court of Common

Pleas of Bucks County. Chief Viola did not assure Bencsik of assistance, but Bencsik did receive the impression that Viola would do whatever he could to help. Subsequently, Chief Viola did successfully intercede on Bencsik's behalf in regard to the pending criminal case. Bencsik also was told by Chief Viola prior to at least two of the telelphone calls that he, Bencsik, was late for a court hearing and subject to arrest. (Tr. of August 23rd at 38, 67). Agent Compton's testimony emphasized that no specific inducements were made to Bencsik before he made the telephone calls. However, Agent Compton did reveal at the hearing that he paid $1,000 to Bencsik approximately two days after the last two monitored telephone calls were placed.

Bencsik also revealed at the hearing held on August 23rd that he may well have either ingested or smoked narcotics before the telephone conversations of January 2nd and 4th (Tr. of August 23rd at 42). Agent Compton testified that he was unaware that Bencsik was under the influence of drugs during the three conversations.

The hearings which I conducted on July 6th and August 23rd did not reveal that the law enforcement officials applied directly any coercion, physical or psychological, to Bencsik to obtain his cooperation in the monitoring of the telephone calls. Contrary to the position taken by the Government, this finding does not end my inquiry and mandate admission of the

tapes. Factors other than direct government coercion or the lack thereof must be taken into account in determining whether consent truly is voluntary.

Whether or not an individual has consented to a government search is a question of fact, to be determined by the trial judge through an examination of the totality of the circumstances.[3] Schneckloth v. Bustamonte, 412 U.S. 218 (1973). No simple test for voluntariness exists. As Justice Frankfurter stated in Culombe v. Connecticut, 367 U.S. 568, 604-5 (1961):

> The concept of "voluntariness" is itself an amphibian. It purports at once to describe an internal psychic state and to characterize that state for legal purposes.

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[3]In United States v. Bonnano, 487 F.2d 654, 658 (2d Cir. 1973), Judge Friendly stated that "the extent of the proof required to show that an informer consented to the monitoring or recording of a telephone call is normally quite different from that needed to show consent to a physical search, whether by the defendant himself or by some person in a position to give an effective one." While Judge Friendly's statement has been cited in this Circuit, Baynes, supra, 400 F.Supp. 285 at 292, it has not been made the law of this Circuit. Nor does the Bonnano case provide a clear means of distinguishing the type of consent needed in a telephone monitoring case from the type which the government must prove in a physical search case. The individual rights which the concept of "consent" is designed to protect, and the difficulty of defining that concept, are present in physical search and eavesdropping cases alike.

Justice Frankfurter's words point out that the legal definition of "voluntary" necessarily differs from the dictionary definition. The Supreme Court has noted elsewhere that, rather than possessing a strict or inflexible meaning, the term "voluntary" has by tradition "reflected an accommodation of the complex of values implicated in police questioning of a suspect." Schneckloth, 412 U.S. at 224-5.

The hearings which I conducted on July 6th and August 23rd convince me that Bencsik's consent was impermissibly clouded by a combination of factors: his drug use at the time of consent, his apprehension of death or physical harm at the hands of the Kellys, the pressure from Clarkson, and the assurances of help from Chief Viola and Agent Compton. The aggregate effect of these circumstances on the voluntariness of Bencsik's consent was particularly important in light of another factor which emerged from the suppression hearing on August 23rd--Bencsik's highly suggestible nature. Bencsik appeared to me at that hearing to be a much different witness than he had been on July 6th. At oral argument, the Assistant United States Attorney agreed with my assessment on that point. Bencsik appeared so highly suggestible that he was asked by the Assistant United States Attorney whether he was under the

influence of narcotics while he was testifying. On cross-examination he was easily led toward a position which could not possibly be accurate. Bencsik's nature is relevant to my inquiry in light of the Supreme Court's instructions in Schneckloth, 412 U.S. at 229: "In examining all the surrounding circumstances to determine if in fact the consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents."

The Government claims that Bencsik's own testimony as to the voluntary nature of his consent must be considered controlling (Government Memorandum of Law, page 3). But the case cited by the Government, United States v. Osser, 483 F.2d 727, 730 (3d Cir.), cert. denied, 414 U.S. 1028 (1973), enunciates no such principle. It instead merely holds that a person's consent is not vitiated solely because at the time of his consent he has yet to receive officially his promised grant of immunity. While Osser does state, "[o]ur inquiry on appeal is limited to whether the consent was voluntary and uncoerced, not whether the motivations for it were altruistic or self-seeking," I have not made Bencsik's altruism or lack

thereof the focus of my analysis in this case. Furthermore, it defies common sense that, at a hearing in which one of the factors legitimately in dispute is the impressionable nature of the subject's mind, a district judge acting as trier of fact must take at face value statements of the subject regarding his mental state at a point in the past.

Nor does the interpretation of Osser offered by United States v. Baynes, 400 F.Supp. 285, 292 (E.D. Pa. 1975) conflict with my position. Judge Becker, in dicta, there noted:

> While Osser does not elucidate a comprehensive standard for measuring the validity of consent, it does indicate that so long as pressure is not initiated by the police for the purpose of overbearing the will of the "consenting" party, the authorization is valid.

I do not interpret this passage, as the Government urges, to hold that no factors other than direct coercion may be examined by a district judge in a hearing to consider the voluntariness of consent. Judge Becker's remarks seen in context deal with the contention made in Baynes that police inducement by itself can operate to vitiate consent. In the case at bar, I have considered the representations made by Chief Viola and Agent Compton only as part of a combination of factors preying upon Bencsik's mind at the time of his consent to the tapings. The distinction between the Baynes case and the case at bar is

underlined by Judge Becker's finding there that "there was no evidence that Robinson [the consentor] was threatened or taken advantage of or that he was under the influence of drugs [italics added]." The fact that possible police inducement is only one of the factors which I have taken into account also distinguishes this case from cases like United States v. Acavino, 467 F.Supp. 284 (E.D. Pa. 1979), in which defendants have moved to suppress recordings on the basis of inducement alone.

The Government also attempts to discount the importance of Bencsik's drug use at the time of his consent by pointing to United States v. Cafaro, 480 F.Supp. 511 (S.D. N.Y. 1979), where an arrested suspect, after agreeing to cooperate with the police, was permitted by a government agent to "shoot up" with desoxyn to relieve withdrawal symptoms prior to making monitored telephone calls. The court in that case refused to find that the suspect's consent was invalid. However, the court justified the standard which it employed in that case as the one applicable in a situation "where a defendant has entered a course of cooperation with the Government," on which the consent to tape is merely "a further step." In the situation at hand, by contrast, Bencsik's cooperation in the taping of the Kellys' conversations was itself his first step on the road of cooperation. Indeed, the first of the tapings

occurred on the same day that Bencsik first spoke with the Bensalem police; it therefore is his mental state at that moment and on January 4th which must be ascertained and evaluated in determining the legitimacy of his consent.

The language of the Supreme Court in Schneckloth quoted elsewhere in this opinion was intended to give district judges a large degree of discretion in making factual determinations of voluntariness. A necessary corollary is that district judges possess a responsibility in such determinations to exercise fully their capacities for evaluating testimony, weighing evidence, and drawing reasonable inferences. It is mindful of this need to consider all the relevant circumstances that I have found that the Government has not carried its burden of showing that Bencsik voluntarily consented to the monitoring of the telephone conversations. Therefore, an Order suppressing the tapes as evidence has been entered.

BY THE COURT:

Edward N. Cahn, J.

OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968

> It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire communication, where ... one of the parties to the communication has given prior consent to such interception.

18 U.S.C. 2511(2)(c).

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial ... if the disclosure of that information would be in violation of this chapter.

18 U.S.C. 2515.

FEDERAL RULES OF CIVIL PROCEDURE

> ... Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses ...

F.R. Civ. P. 52(a).

Office Supreme Court, U.S.
FILED
SEP 23 1983
ALEXANDER L. STEVAS,
CLERK

Nos. 83-285 and 83-5296

In the Supreme Court of the United States

OCTOBER TERM, 1983

STEPHEN KELLY, PETITIONER

v.

UNITED STATES OF AMERICA

MICHAEL KELLY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-285

STEPHEN KELLY, PETITIONER

v.

UNITED STATES OF AMERICA

No. 83-5296

MICHAEL KELLY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the court of appeals erred in reversing an order suppressing evidence.

On February 8, 1982, petitioners were charged in an indictment returned in the United States District Court for the Eastern District of Pennsylvania with conspiracy to manufacture, distribute, and possess with intent to distribute controlled substances, in violation of 21 U.S.C. 846, and with knowingly and intentionally using a telephone in facilitating the commission of a felony, in violation of 21 U.S.C.

843(b). In addition, petitioner Stephen Kelly was charged with using a firearm to commit a felony, in violation of 18 U.S.C. (Supp. V) 924(c)(1). Before trial, petitioners moved to suppress three taped conversations with one Edward Bencsik that were recorded with the latter's consent. On August 25, 1982, the district court suppressed the conversations as evidence on the ground Bencsik's consent to police monitoring of his conversations "was impermissibly clouded" by several factors: his possible drug use, his apprehension of physical harm from petitioners, the pressure from a friend, the assurance of help from law enforcement officials, and Bencsik's own "highly suggestible nature" (83-5296 Pet. App. 9a-20a). The court of appeals reversed in a split decision, concluding that the record clearly established that Bencsik had voluntarily consented to have his telephone conversations with petitioners recorded (83-285 Pet. App. 1-15; 708 F.2d 121).

Petitioners contend (83-5296 Pet. 10-15; 83-285 Pet. 15-28) that the court of appeals misapplied the clearly erroneous standard of review to factual findings of the district court. Whatever the merits of petitioners' contentions, they are not presently ripe for review by this Court.[1] The court of appeals' decision places petitioners in precisely the same position they would have occupied if the district court had denied their motion to suppress. If petitioners are acquitted following a trial on the merits, their contentions will be moot. If, on the other hand, petitioners are convicted and their convictions are affirmed on appeal, they will then be able to present their contentions to this Court, together with any other claims they may have, in a petition for a writ of

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[1]It is now 19 months since the return of the indictment and over one year since the district court's suppression order. Further interlocutory review at this time would cause additional delay in trial of the charges against petitioners.

certiorari seeking review of a final judgment against them. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.[2]

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

SEPTEMBER 1983

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[2]Because this case is interlocutory, we are not responding on the merits to the question presented by the petitions. We will file a response on the merits if the Court requests.

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